No. 96-643

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,

Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Daniel J. Popeo
Paul D. Kamenar
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

Barry M. Hartman
Counsel of Record
Rima Y. Mullins
KIRKPATRICK & LOCKHART, LLP
1800 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 778-9000

Date: May 2, 1997

CASILLAS PRESS – 1717 K STREET NW WASHINGTON DC 20036 – 202-223-1220

34 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTION AND STATUTES:

OTHER AUTHORITIES:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

No. 96-643

The Steel Company, a/k/a
Chicago Steel and Pickling Company,
Petitioner,

v.

Citizens for a Better Environment,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF AMICUS CURIAE
THE WASHINGTON LEGAL FOUNDATION
IN SUPPORT OF PETITIONER

INTERESTS OF AMICI CURIAE[1]

The Washington Legal Foundation ("WLF") is a non-profit, public interest law and policy center based in

---

[1] Pursuant to Supreme Court Rule 37.6, amicus hereby indicates that no counsel for a party in this case authored this amicus brief in whole or in part.

Washington, D.C., with supporters nationwide. WLF is dedicated to supporting the free enterprise system and promoting the principles of judicial restraint and separation of powers. To this end, WLF has appeared in this Court as *amicus curiae* on numerous occasions, particularly in environmental cases that raise issues relevant to this case. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990).

Written consent to the filing of this brief has been granted by counsel for all parties, copies of which have been filed with the Clerk of this Court.

STATEMENT OF THE CASE

In the interests of judicial economy, amicus adopts by reference the Statement of the Case as presented in the brief of the Petitioner. In short, this case presents the Court with the issue of whether the citizen suit provision of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11046, authorizes persons to file suit against companies for reporting violations that were cured before the citizen suit was filed, and where there are no allegations that the violations would likely occur again. This issue necessarily entails the constitutional question of whether the plaintiff in this and similar cases has standing under Article III to invoke the jurisdiction of federal courts.

SUMMARY OF ARGUMENT

EPCRA does not authorize citizen suits for violations that have occurred in the past and that have been *fully corrected* by the time suit is filed. Rather, a fair reading

of the statutory language, this Court's controlling authority, and the legislative history underlying the development of "citizen suit" provisions generally compels the conclusion that Congress intended that the citizen suit provision in EPCRA would only authorize suits for ongoing violations.

Furthermore, a citizen plaintiff suing for wholly past violations of EPCRA simply does not have standing under Article III of the Constitution. First, the citizen plaintiff cannot establish a specific injury-in-fact arising from the alleged loss of information. Second, even if an injury-in-fact could be shown, none of the remedies available to the citizen plaintiff under the statute would redress the alleged informational injury. Indeed, at the time suit is filed for historic or wholly past violations, the citizen plaintiff has the information which was allegedly wrongfully withheld. As the citizen plaintiff cannot sue for money damages under EPCRA, federal courts are without power to fashion any further remedy.

Lastly, allowing citizen suits for wholly past violations of EPCRA violates the separation of powers doctrine. Article II of the Constitution provides that the Executive has the authority to enforce the laws. Suits to enforce wholly past violations can only serve the public interest, and such enforcement powers is the essence of Executive power. Authorizing citizen suits to exercise such enforcement powers constitutes a usurpation of Executive powers by Congress, undermines this authority, and impermissibly dissipates the Executive's prosecutorial powers. EPCRA's citizen suit provision should be interpreted to avoid this serious constitutional question.

ARGUMENT

I. CONGRESS DID NOT INTEND EPCRA TO PERMIT CITIZEN SUITS FOR WHOLLY PAST REPORTING VIOLATIONS

In determining whether the citizen suit provision of EPCRA, 42 U.S.C. § 11046, allows a citizen plaintiff to bring suit for wholly historic violations, one must look first to the language and structure of the statute, and only if the statute is unclear, to the legislative history of the statutory provision in question. Amicus submits that a fair reading of the law demonstrates that Congress did not intend to permit citizen suits for EPCRA violations that have been corrected.

In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), this Court found that the citizen suit provision of the Clean Water Act (CWA), 33 U.S.C. § 1365, did not authorize suits for wholly historic violations. Remarkably, using what it described as the same analytical approach to determine the meaning of a similar citizen suit provision in EPCRA, the court of appeals below reached the opposite result, holding that EPCRA does authorize such suits.

In reaching its decision, the Seventh Circuit engaged in "hypertechnical parsing"[2] of the language of the relevant sections of EPCRA in order to distinguish similar language

---

[2] *Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473, 476 (6th Cir. 1995) (rejecting as "hypertechnical parsing" attempts to distinguish between citizen suit provisions of EPCRA and CWA).

used in the CWA. EPCRA authorizes suits against a company "for failure to" file certain reports, 42 U.S.C. § 11046(a)(1)(A), whereas the CWA and a number of other environmental laws authorize suits against companies alleged "to be in violation" of the respective substantive statutes. *See, e.g.*, 33 U.S.C. § 1365(a)(1).

Amicus submits that the lower court failed to appreciate a key difference between the CWA and EPCRA. CWA and similar statutes require that action be taken every day to assure compliance with their substantive requirements. Because compliance is required daily, violations may be ongoing and continuous. EPCRA, on the other hand, is a purely a reporting statute requiring the filing of certain forms once a year. Once the forms have been filed, whether a day, month, or year late, the company ceases to "fail" to file the required reports.

Amicus further notes that the same "for failure to" language which the lower court concluded authorizes citizen suits for wholly past violations against companies is also used to permit suits against the EPA Administrator, a State Governor, or a State emergency response commission for their failure to company with certain duties under EPCRA. For example, the EPA Administrator can be sued by a citizen for failing to "publish inventory forms" within a certain period of time, 42 U.S.C. §11046(a)(1)(B)(i), or for failing to respond to a petition to add or delete a chemical to its inventory list within 180 days. 42 U.S.C. §11046(a)(1)(B)(ii). Likewise, a State Governor or State emergency response commission can be sued for failure to provide certain information to a requester within 120 days after the request. 42 U.S.C. §11046(a)(1)(D).

Surely, Congress did not intend that citizen plaintiffs be permitted to sue the EPA Administrator or State Governor *after* those officials carried out their duties simply because they were tardy in doing so. Rather, Congress provided in EPCRA that the district courts would have jurisdiction "to enforce the requirement concerned" that companies have failed to comply with, and to order the Administrator "to perform the act or duty concerned." 42 U.S.C. § 11046(c). This remedial language suggests that Congress intended citizen suits to enjoin current or ongoing violations, rather than to waste scarce judicial resources issuing meaningless declaratory judgments that past violations have occurred but have been corrected.

Indeed, the Seventh Circuit's zeal to find that EPCRA permits suits for wholly past violations led it to conclude that the word "occurs," as used in EPCRA,[3] is not "cast in the present tense." *Citizens For A Better A Environment v. The Steel Company*, 90 F.3d 1237, 1244 (7th Cir. 1996).

Yet even the Respondent concedes that, except for EPCRA and the Clean Air Act (which will be discussed *infra*), all the other major environmental statutes require that a plaintiff "must allege an ongoing violating" of those statutes. Opp. Cert. at 3. If this is true, it seems odd that Congress would provide for *fewer* opportunities for citizen suits in those substantive environmental laws. As one commentator aptly put it:

---

[3] *See* 42 U.S.C. § 11046(d)(1) (copy of 60-day notice by plaintiff is to be given to the State in which "the alleged violation occurs").

> [I]t should be noted that violators of the. . . CWA, unlike EPCRA violators, do not wholly undo the effects of their past violations simply by coming into present compliance. Accordingly, if Congress did not deem nonrecurring violations of these substantive health protections to warrant citizen suits, it is difficult to understand why it would have treated nonrecurring violations of a reporting statute more harshly. By the same token, the argument of diminished deterrence fails to demonstrate why Congress would depart from the structure of its major environmental statutes to seek greater deterrence of reporting violations than substantive violations.

B. Cohen and D. Haire, *Environmental Citizen Suits: Standing and the Proper Scope of Relief; Citizen Suits and Qui Tam Actions: Private Enforcement of Public Policy*, NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST 49 (July 1996) (hereinafter cited as "Cohen and Haire").

Amicus will not repeat the other compelling statutory construction arguments made by Petitioner in this case. Amicus does wish to point out, however, two statutory provisions common to all citizen suit provisions. Those provisions compel, as a constitutional matter, that if there is any doubt about whether EPCRA authorizes citizen suits for wholly past violations, those doubts should be resolved against finding such authorization.

First, each of the major environmental laws authorizing citizen suits specifically limits such actions to those filed by

a citizen "on his own behalf."[4] As further explained below, a suit filed for wholly past violations that have been corrected, necessarily is brought on the public's behalf, since there is no injunctive relief that could be granted to benefit the individual. At the heart of the exercise of the Executive's power under Article II is the power to enforce laws on behalf of the public. By expressly providing that citizen suits may be brought only on the citizen's own behalf, Congress recognized the important Article II constitutional interest that must be preserved, and concomitantly, the limits on its power to infringe on that protected interest.

Second, each of the noted statutes specifically precludes such actions unless and until the party being sued is given 60-day notice of such suit.[5] In *Gwaltney*, this Court found that the requirement of 60-day notice prior to initiating a citizen suit was enacted to allow compliance with the CWA and render such a suit unnecessary, and is

---

[4] *See* EPCRA, 42 U.S.C. §11046(a)(1); CWA, 33 U.S.C. §1365(a); Clean Air Act (CAA), 42 U.S.C. §7604(a); Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §1270(a); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9659(a); Solid Waste Disposal Act (SDWA), 42 U.S.C. §6972(a); Toxic Substances Control Act (TSCA), 15 U.S.C. §2619(a); and Endangered Species Act (ESA), 16 U.S.C. §1540(g).

[5] Virtually identical 60-day notice requirements exist under EPCRA, 42 U.S.C. §11046(d); CAA, 42 U.S.C. §7604(b); CERCLA, 42 U.S.C. §9659(d)(1); SMCRA, 30 U.S.C. §1270(b)(1); SWDA, 42 U.S.C. §6972(b); ESA, 16 U.S.C. §1540(g)(1)(C).

further evidence that the Congress enacting this provision did not intend that it be used to bring an action for wholly past violations. The Court reasoned that:

> it follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit. If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous.

Gwaltney, 484 U.S. at 60.

Instead of following the straightforward and direct analytical approach of this Court in *Gwaltney*, the lower court embarked on a wholly inappropriate examination of the legislative history of the CAA, enacted years after EPCRA, by a different Congress. Specifically, in 1990, Congress amended the CAA to expressly allow for citizen suits for violations of that law that began in the past, but only "if there is evidence that the alleged violation has been repeated." 42 U.S.C. §7604(a)(1)(3). Remarkably, the Seventh Circuit interpreted this amendment of an unrelated statute to allow for suits in the case of intermittent violations as a repudiation of this Court's reasoning in *Gwaltney* and support for the holding that EPCRA authorizes suit for wholly historical violations. *Citizens For A Better Environment*, 90 F.3d at 1244.

Courts should and do have reservations about the use of legislative history as a means of determining Congressional intent. *See United States v. O'Brien*, 391 U.S. 367, 383-384, *reh'g denied*, 393 U.S. 900 (1968)

("inquiries into congressional motives or purposes are a hazardous matter. . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it. . . "). "The judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations . . ." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

It is particularly hazardous to rely on the inaction of Congress in an attempt to discern legislative intent. Instead of relying on the intent of the enacting Congress, the lower court impermissibly focused on a subsequent Congress' intent. *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."). Inferring from the inaction of Congress in failing to amend the notice provision of the CAA in 1990 that Congress thereby intended EPCRA's citizen suit provision to apply to wholly historic violations flies in the face of well-settled jurisprudence of statutory interpretation, not to mention common sense.

Not only does this interpretation impute to the enacting Congress the presumed intent of a subsequent one, it infers this intent from the inaction of Congress in amending a *wholly different statute*. Congress reasonably may have intended the CAA, a statute which imposes ongoing daily (and even hourly) obligations to limit certain air emissions, to allow suits for certain intermittent and recurring violations. EPCRA imposes a once-a-year obligation to file certain forms. As the court in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995) stated:

> [O]ne can argue with at least equal force that by amending the Clean Air Act, but failing also to amend EPCRA, Congress intended to limit EPCRA's citizen suit provisions to violations existing at the time the suit is filed . . . . We discern nothing in the legislative history [of EPCRA] that indicates that Congress intended to allow citizens to sue [for past violations].

Id. at 477. Amicus submits that for this reason alone, the legislative history of CAA, gleaned from events that took place in Congress *in 1990*, is irrelevant to the determination of legislative *history* of EPCRA which was enacted in *1986*.

To compound its error, the court of appeals got the legislative history of the CAA wrong. Congress and the Executive were justifiably concerned about the possible unconstitutionality of the proposed 1990 CAA amendments, and that these concerns were dealt with by requiring that the citizen plaintiff show in a suit under the CAA, at minimum, that the alleged violation "has been repeated" rather than constitute a wholly historic violation. 42 U.S.C. § 7604(a)(1).

In a letter to the Senate, then Attorney General Richard Thornburgh expressed the Executive Branch's concern that a provision allowing citizen suits for wholly past violations would "raise important questions under Article II and Article III of the Constitution." Cong. Rec. S5282 (1990). One Senator pointed out that "the citizen plaintiff lacks constitutional standing to sue for a past violation which presents no prospect of present or future harm." *Id.* at 6440-41 (1990). In signing the 1990 CAA amendments into law, President Bush reiterated those concerns:

> [T]here are certain aspects of the bill's enforcement provisions that raise constitutional questions. I note that in providing for citizen suits for civil penalties, the Congress has codified the Supreme Court's interpretation of such provisions in the *Gwaltney* case. *As the Constitution requires, litigants must show, at minimum, intermittent, rather than purely past violations of the statute in order to bring suit.* This requirement respects the constitutional limitations on the judicial power and avoids an intrusion into the law-enforcement responsibilities of the executive branch.

Signing Statement, P.L. 101-549, November 19, 1990; PUB. PAPERS 1604 (1990) (emphasis added).[6]

Construing EPCRA to allow suits for wholly historic violations creates constitutional issues under both Article II and Article III, as further explained below, and violates the well-established rule that a statute should be construed in order to avoid constitutional questions. *See Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227, 2237 (1995) ("we ordinarily should construe statutes to avoid serious constitutional questions"). Rather than presuming that "Congress, which also has sworn to protect the Constitution, would intend to err on the side of

---

[6] Statements made in Presidential Signing Statements are relevant to ascertaining legislative intent. See *D. Mayhew, Inc. v. Wirtz*, 413 F.2d 658 (4th Cir. 1969) (relying on President Truman's signing statement, as well as congressional statements, in interpreting the Portal-to-Portal Act); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 678 n.16 (D.C. Cir. 1976) (considering signing statement in determining the possible breadth of the trade secrets exception under the Freedom of Information Act).

fundamental constitutional liberties when its legislation implicates those liberties," *Regan v. Time, Inc.*, 468 U.S. 641, 697 (1984), the lower court and the Respondent would have this Court presume that Congress intended to draft EPCRA in such a way so as to create serious constitutional issues.

Accordingly, amicus submits that Congress did not intend that EPCRA would authorize citizen suits against companies, or against the EPA for that matter, for wholly historic reporting or other violations that were cured before suit was filed.

II. CITIZEN PLAINTIFFS DO NOT HAVE ARTICLE III STANDING TO BRING AN ACTION FOR WHOLLY PAST VIOLATIONS OF EPCRA

Even if Congress did intend EPCRA to authorize citizen suits for wholly past violations, Article III of the Constitution prohibits federal courts from entertaining those suits because the plaintiffs lack standing to bring them.

The doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process. A threshold issue in every federal case is whether the plaintiff has made out a justiciable case or controversy within the meaning of Article III of the Constitution of the United States. *See Warth v. Seldin*, 422 U.S. 490 (1975). The party invoking federal jurisdiction has the burden of establishing Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 505, 559 (1992). Amicus submits that even if Congress intended to authorize citizen suits for wholly historic violations of EPCRA, the citizen plaintiff would not have standing under Article III.

The concept of standing does not refer simply to the party's capacity to appear in court; rather, standing is gauged by the specific common-law, statutory or constitutional claims the party presents. *See International Primate Protection League v. Admin. of Tulane Educational Fund*, 500 U.S. 72 (1991). Although some of the elements of standing are prudential, the "core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Defenders of Wildlife*, 504 U.S. at 560. The irreducible constitutional standing requirements consist of three elements: injury in fact, causation and redressibility. *Id.* at 560.

This Court has explicitly stated that Article III does not recognize a "congressional conferral upon all persons of an abstract, self contained, non-instrumental 'right' to have the Executive observe the procedures required by law." *Id.* at 573. *See also Warth*, 422 U.S. at 501 (although Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules, it cannot eliminate the Article III standing requirements); Scalia, *Doctrine of Standing*, 17 Suffolk U. L. Rev. 881, 885 (1983) (Article III core standing requirements create a constitutional minimum which cannot be eliminated by Congress).

In *Gwaltney*, while this Court found that the citizen suit provision of CWA did not allow suits for wholly past violations, it remanded the case to the lower courts to determine whether the plaintiff's complaint "contained a good-faith allegations of ongoing violation" by the company. 484 U.S. at 64. In sharp contrast, CBE did not even allege any ongoing or continuing violations by the company. *See* Pet. A25. Accordingly, CBE lacks standing to bring this case.

A. Wholly Past Violations of EPCRA Cannot Create An Injury In Fact

The first element which a plaintiff must establish to show Article III standing is that it has suffered an injury-in-fact. "Injury-in-fact" has been defined by this Court to mean "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Defenders Of Wildlife*, 504 U.S. at 560 (citations and quotations omitted). Furthermore, this Court has held that a mere interest in a problem, no matter how long-standing or sincere, is not sufficient by itself to establish an injury-in-fact. *See Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). As this Court explained:

> [T]he requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.

Id. at 740.

Although Congress may grant an express right of action to persons who would otherwise be barred by prudential standing rules, "Article III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth*, 422 U.S.

at 501.[7] Thus, EPCRA's provision that "any person" may commence a civil suit for failure to file the required reports is not sufficient to satisfy the requirement of injury-in fact under Article III. *See* 42 U.S.C. § 11046(a); *Defenders of Wildlife*, 504 U.S. at 563 ("[b]ut the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured").

---

[7] Amicus submits that the language in EPCRA which provides that a "person" may sue for violations "on his own behalf," is clear evidence of Congress' intent to limit standing or the scope of a private right of action under EPCRA. In its complaint, CBE alleges that it is suing on "behalf of *both* itself *and its members*." CBE Complaint ¶ 6, J.A. 4 (emphasis added). EPCRA, however, expressly authorizes a person, including an entity, to bring a suit only on his or its own behalf and not on behalf of third parties or the government, such as a *qui tam* lawsuit. See discussion, *supra*, at 7-8.

With respect to the prudential aspect of standing, it is true that this Court has permitted third parties or organizations to raise representational standing where their members could have shown Article III standing in their own right. *See, e.g., Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333 (1977). While Congress is free to eliminate *all* prudential barriers to standing by providing for citizen suits without qualification (save, of course, for limits under Article III), Congress is also free to keep or place one or more such prudential barriers in the law, and Congress has done so here. Accordingly, allegations in CBE's complaint with respect to alleged injuries suffered by its members cannot properly form a basis for a suit under EPCRA. While neither CBE nor its members suffer Article III injury-in-fact in this case, CBE can sue under EPCRA, if at all, only on its own behalf.

EPCRA has two primary purposes: (1) to compile accurate, reliable information on the presence and release of toxic chemicals and to make that information available on a localized level and (2) to use the reported information to formulate emergency response plans by state and local response groups. *Citizens For A Better Environment*, 90 F.3d at 1239. At least one commentator has noted that under EPCRA, a citizen plaintiff must show an "informational injury" in order to establish an Article III injury-in-fact. *See* Shalvelson, *EPCRA, Citizen Suits and the Sixth's Circuit Assault of the Public's Right-To-Know*, 2-Fall Alb. L. Envtl. Outlook 29, 33 (1995).

This Court has never explicitly recognized the sufficiency of informational standing for Article III purposes. In *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990), this Court noted that mere adverse effects as a result of lack of information would not be sufficient to create standing; rather the plaintiff must be able to show a particularized injury suffered as a result of the lack of information. *Id.* *See also* Gatchel, *Informational and Procedural Standing After Lujan v. Defenders of Wildlife*, 11 J. Land Use & Envtl. L. 75, 86 (1995) ("Informational standing is granted only to groups that can show "specific facts" which prove that they normally use the information."). This limitation is consistent with the traditional standing requirement that

a plaintiff show a concrete injury to its specific interests.[8]

Where, as in the instant case, the plaintiff alleged wholly past violations of EPCRA and is seeking only a declaratory judgment, the imposition of civil penalties payable to the U.S. Treasury, and attorneys' fees, informational injury cannot form the basis of an Article III injury-in-fact. Any "injury" suffered due to lack of information as a result of a defendant's wholly historic failure to file reports required by EPCRA is a past injury that has been corrected.

It is well-established that past injuries are not sufficient to satisfy the injury-in-fact requirement of Article III in the absence of a claim for money damages. *See Los Angeles v. Lyons*, 461 U.S. 95 (1983) (in dismissing Lyons' claim for injunctive relief, the Court found that Lyons could not establish that he would suffer the same injury again and, therefore, was no more entitled to injunctive relief than any other citizen);

---

[8] CBE's Complaint merely alleges that The Steel Company, in filing late EPCRA reports, "has deprived citizens, including members of CBE, of information. . ." Complaint, ¶ 1; J.A. at 2. CBE also alleges that the past failure of The Steel Company to file the reports under EPCRA "defeated the purposes of EPCRA, which are to inform people, annually and in a timely manner, about the presence of hazardous chemicals, to assist in local emergency planning and response, and to aid in the development of appropriate regulations, guidelines and standards" Complaint, ¶ 20; J.A. at 8. These "injuries" appear to be generalized injuries suffered by all the residents of the Chicago area, which would not satisfy the traditional injury-in-fact requirement.

O'Shea v. Littleton, 414 U.S. 488, 496 (1974) (past wrongs are probative of whether there is a real and immediate threat of repeated injury, however, plaintiffs have standing only when their injuries are real and immediate enough to show an existing controversy).

EPCRA does not authorize a citizen plaintiff to seek money damages for any economic losses suffered by the lack of the information. Therefore, under this Court's teaching, absent a showing of a real and immediate threat of future violations, a citizen plaintiff cannot satisfy the requirement of injury-in-fact under Article III merely by alleging wholly past violations of EPCRA. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 70 (Scalia, J., concurring in part and concurring in the judgment) ("If it is undisputed the defendant was in a state of compliance when this suit was filed, the plaintiff would have been suffering no remediable injury in fact that could support suit.").[9] Indeed, even the majority in *Gwaltney* opined that allegations of historically recurring violations could be rendered moot if there "is no reasonable expectation that the wrong will be repeated." *Id.* at 66.

---

[9] CBE attempts to distinguish this case from one in which the failure to file was corrected *prior* to the receipt of notice from a citizen plaintiff. Opp. Cert. at 13-14. This distinction is irrelevant. First, for Article III purposes, whether an injury constitutes a "past" violation does not depend on the length of time between the alleged injury and the filing of suit. Second, the Question Presented upon which the Court granted review did not make a distinction between pre- and post-notice late filers. Finally, the court of appeals rationale permitting suits for past violations would appear to apply to all late filings, regardless of whether notice was first provided.

In the final analysis, the filing of the EPCRA reports in this case, however late, moots any controversy in the same way, for example, that the delayed release of agency documents to a requester under the Freedom of Information Act would moot any subsequently filed lawsuit complaining that the agency's response was untimely because it did not occur within the 10-day period as required by FOIA. *See* 5 U.S.C. § 552(a)(6)(A)(i). Indeed, EPCRA, unlike FOIA, does not even require that the information be provided to CBE or any individual who requests the information; rather, EPCRA requires that the forms be filed with certain government agencies, 42 U.S.C. §§ 11022(a), 11023(a). None of these agencies have sued The Steel Company, presumably because the company promptly complied with EPCRA after it first learned of EPCRA's requirements from the 60-day notice, and continues to comply today.

B. A Citizen Plaintiff Cannot Establish Redressibility For Wholly Past Violations Of EPCRA

In addition to establishing injury-in-fact, in order to have Article III standing a citizen plaintiff must satisfy the redressibility prong of standing, or, in other words, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Defenders of Wildlife*, 504 U.S. at 560. (citations omitted) (quotations omitted). The requirement of redressibility discourages advisory opinions and restrains courts from deciding cases when a favorable outcome will not operate to make the petitioning party whole. *See* Guilds, *A Jurisprudence of Doubt: Generalized Grievances As A Limitation to Federal Court Access*, 74 N. C. L. Rev. 1863, 1875 (1996). A favorable judgment must redress the

injured plaintiff even while serving a general public goal. *See Allen v. Wright*, 468 U.S. 737, 758 (1984).

Assuming, *arguendo*, that a citizen plaintiff who brings suit for wholly historical violations of EPCRA can, at most, claim a temporary informational injury, EPCRA provides no remedies that would redress that injury. Citizens may seek injunctive and declaratory relief and civil penalties that are payable only to the U.S. Treasury. 42 U.S.C. § 11046. The court also has discretion to award costs and fees to the prevailing party in a proper case. *Id.* Yet none of these possible prospective "reliefs" will remove the harm allegedly suffered by the citizen plaintiff due to the untimely filing, and which has already been cured. *See Warth*, 422 U.S. at 505 (Article III requires that the prospective relief will remove the harm alleged by the plaintiffs).

As this Court stated in *Defenders of Wildlife*, such generalized grievances do not satisfy Article III:

> We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the constitution and laws, and *seeking relief that no more directly and tangibly benefits him that it does the public at large—does not state an Article III case or controversy.*

Defenders of Wildlife, 504 U.S. at 573-74. (emphasis added).

A few district courts have found redressibility for wholly past violations of EPCRA based on the deterrent

effect of the civil penalties or the possibility of enjoining the reporting company from violating the statute in the future, as well as the award of attorneys' fees and costs. *See, e.g., Don't Waste Arizona, Inc. v. McLane Foods, Inc.*, 950 F. Supp. 972 (D. Ariz. 1997). These cases are clearly at odds with this Court's precedents. This Court has held, for example, that the possibility of an award of attorneys' fees is not sufficient to satisfy Article III standing. *See Lewis Continental Bank v. Lewis*, 494 U.S. 472 (1990) (interest in attorneys' fees under civil rights statutes is insufficient to create Article III case or controversy where none exists on the merits of the underlying claim).

Furthermore, the possible deterrent effect of civil penalties or an injunction against future violations is too speculative to satisfy the redressibility requirement as articulated by this Court. In *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), this Court considered the standing of indigents who challenged the designation of certain hospitals as "charities" for tax purposes. In finding that the plaintiffs had failed to establish standing, the Court stated:

> The complaint only alleged that petitioners, by the adoption of Revenue Ruling 69-545, had "encouraged" hospitals to deny services to indigents. The implicit corollary of this allegation is that a grant of respondents' requested relief . . . would "discourage" hospitals from denying their services to respondents. But it does not follow from the allegation and its corollary that the denial of access to hospital services in fact results from petitioners' new Ruling, *or that a court-ordered return by petitioners to their previous policy would result in these respondents' receiving the hospital services they desire.*

Id. at 42, 43. (emphasis added). Likewise, the possible deterrent effect of the imposition of civil penalties is wholly speculative, particularly when the citizen plaintiff has made no allegations -- and in this case, could not make any allegation -- that a recurring violation is likely. In short, when a citizen plaintiff brings suit for wholly past violations of EPCRA, no action by the court can remove the harm allegedly suffered by the plaintiff.[10] *See also* Abell, *Ignoring the Trees for the Forests: How The Citizen Suit Provision of The Clean Water Act Violates The Constitution's Separation of Powers Principle*, 81 Va. L. Rev. 1957, 1982 (1995)(arguing that the possible deterrent effect of civil penalties and injunctions imposed as a result of a citizen suit under the Clean Water Act does not satisfy the redressibility requirement of Article III, as defined by this Court).

---

[10] Claims for past violations of EPCRA also are barred by the related doctrine of mootness, as any violation is cured prior to the filing of suit. *See Warth*, 422 U.S. at 499 n.10 (standing question bears a close affinity to that of mootness, i.e., whether the occasion for judicial intervention persists). A case is moot and not justiciable when the issues presented are no longer "live" or when the parties no longer have a legally cognizable interest in the outcome. As noted, *supra* at 19, this Court in *Gwaltney* noted that even allegations of *ongoing* violations can be mooted; *a fortiori*, claims only of wholly past violations that have been corrected are clearly moot.

III. CONSTRUING THE CITIZEN SUIT PROVISION UNDER EPCRA TO AUTHORIZE SUITS FOR WHOLLY PAST VIOLATIONS WOULD CONFLICT WITH FUNDAMENTAL SEPARATION OF POWERS PRINCIPLES

The Constitution allocates governing power among the three branches of government to "protect the liberty and security of the governed." *Metropolitan Washington Airports Auth. v. Citizens For The Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 273 (1991). "The Constitutional's central mechanism of separation of powers depends largely upon a common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Defenders of Wildlife*, 504 U.S. at 559. Under this framework, Congress is given the responsibility to create laws, and the President cannot perform these primary legislative functions. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Conversely, the President is given the responsibility to enforce the laws or appoint agents charged with the enforcement of laws, and Congress cannot perform or usurp these primary executive functions. *See Buckley v. Valeo*, 424 U.S. 1, 123-24 (1976).

As Justice Scalia explained in *Defenders of Wildlife*:

> Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. . . To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to

> permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."

Id. at 576, 577. While amicus recognizes that the Article II issue is not directly before the Court, the constitutional issue should nevertheless inform this Court's judgment with respect to the proper interpretation of EPCRA's citizen suit provision.

Allowing actions for wholly past violations under the citizen suit provision in EPCRA would constitute an unconstitutional usurpation of executive powers by Congress. The prosecution of cases to enforce public rights is, and always has been, a primary executive function. *See United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive has exclusive authority and absolute discretion to decide whether to prosecute a case"). Therefore, transfer of the law enforcement power from the Executive to another entity is an unconstitutional invasion of the executive's primary constitutional function. *See Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (the power not to prosecute or enforce laws is an integral part of the executive's constitutional duty to "take Care that the Laws be faithfully executed"). Congress may not pass a citizen suit provision that withdraws power from a co-equal branch and assign that power to a private citizen without a

personal stake in the controversy.[11]

The grant of prosecutorial power to private citizens solely to vindicate public rights under EPCRA undermines the Executive's authority by transferring a unique prosecutorial function from the Executive branch to a private citizen. In *Morrison v. Olson*, 487 U.S. 654 (1988), this Court set forth the test for determining whether a delegation of prosecutorial power violated the separation of powers doctrine. In making the determination, the Court considered three areas of control by the Executive: the initiation of the action, the scope of the action, and the termination of the action. *Id.* at 650-1, 691-96.

The authorization of citizen suits for wholly past violations, such as the one brought by CBE, fails to satisfy the *Morrison* test. The Executive has very little authority to control the initiation of the suit. Although EPCRA provides that a citizen may not bring suit if EPA takes action within the 60-day notice period, this control is largely illusory. *See* 42 U.S.C. § 11046(e). Action by EPA bars the citizen suit only if the government has "commenced and is diligently pursuing an administrative order or civil action." *Id.* Similar provisions containing "diligently prosecuting" preclusions have been interpreted

---

[11] "The exercise of significant authority pursuant to the laws of the United States, including 'conducting civil litigation in the courts of the United States for vindicating public rights,'... may be carried out only by "Officers of the United States,"... appointed in conformity with the Appointments Clause of the Constitution." Cohen and Haire, *supra*, at 31 (footnotes omitted). As previously discussed, this limitation is recognized in EPCRA, by expressly limiting citizen suits to those brought on the citizen's "own behalf."

very narrowly to exclude informal settlements and administrative solutions. *See Sierra Club v. Chevron U.S.A.*, 834 F. 2d 1517 (9th Cir. 1987); *Washington Area Pub. Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993) (EPA compliance order cannot preclude suit); *Natural Resources Defense Council v. Fina Oil & Chemical Co.*, 806 F. Supp. 145, 146 (E.D. Tex. 1992) (compliance order does not bar citizen suit; to bar citizen suit, there must be a court action).

Particularly in the context of wholly historical violations of EPCRA, EPA may determine that an informal resolution will best serve the government's interest in effectuating future compliance. The constitutionally based power of the Executive to enforce the law for the public good is eviscerated by the citizen suit provision if it were used to prosecute wholly past violations.

There is an additional potential Article II concern that the Court should consider. Not only does a citizen suit for wholly past violations constitute an improper exercise of a unique Executive Branch function, but to the extent that the suit seeks civil penalties that are payable only to the United State Treasury, it may violate the Appointments Clause of Article II. Recoupment of civil penalties for the Treasury is a power that may be exercised only by an officer of the United States. *See Confiscation Cases*, 74 U.S.(Wallace) 454, 458-59 (1868). As one commentator noted, "This principle, which flows from the public nature of the relief itself, would bar private actions for civil penalties, even if it could be established beyond question that those penalties indirectly benefited the citizen-plaintiff." Cohen and Haire, *supra*, at 31.

Significantly, the main argument which has been advanced to preclude citizen suits from violating separation of powers principles is that the Article III requirement of standing insures that the citizen plaintiff has a real and concrete interest in the action and that the governmental interest is merely incidental. As discussed at length above, this argument is unavailable when the citizen plaintiff attempts to bring a claim for wholly historical violations. *See also* Scalia, 17 Suffolk U. L. Rev. at 897-98 (the essential element that links the 'intimately related doctrines of standing and separation of powers is "the requirement of *distinctive* injury not shared by the entire body politic.") (emphasis in the original). As noted, *supra*, at 7-8, this fundamental principle is embodied by the limitation on citizen suits to those filed on the citizen's "own behalf."

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals, and reinstate the district court's judgment dismissing the action against The Steel Company.

Respectfully submitted,

Daniel J. Popeo
Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Ave. NW
Washington, D.C. 20036
(202) 588-0302

Barry M. Hartman
(Counsel of Record)
Rima Y. Mullins
Kirkpatrick & Lockhart, LLP
1800 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 778-9000

Date: May 2, 1997